STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 24, 2006
v	No. 262861 Gogebic Circuit Court
DALE JOE ERICKSON, Defendant-Appellant.	LC No. 04-000282-FH

Before: Whitbeck, C.J., and Murphy and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction for operating a vehicle under the influence of liquor, third offense, MCL 257.625(1). We affirm.

Two complainants alleged that they were forced off the road by a vehicle operated by defendant. The vehicle entered the complainants' lane of travel, forcing them to drive onto a curb to avoid a collision. They called the police at 4:30 pm, shortly after the incident. Police arrived within ten minutes of the call. One of the complainants identified defendant as the driver of the vehicle. Investigating officers were sent to defendant's house to talk to him, and arrived approximately ten minutes later. Defendant admitted he was involved in a near accident. However, he said that his hand slipped off the wheel while he turned. He also maintained that the incident happened over an hour earlier. While the police spoke with defendant, they observed that he appeared intoxicated. The police checked the hood of defendant's car and felt that it was still warm. At this time, they decided to arrest defendant for drunk driving. When defendant learned that he was to be arrested, he maintained that he had drunk three large whiskey mixed drinks after he arrived home. One of the officers walked through the house, but did not see any evidence of recent alcohol consumption. A preliminary breathalyzer test administered to defendant at 4:54 p.m. registered 0.20 grams of alcohol per 210 liters of breath and another breathalyzer test administered at 5:32 p.m. registered 0.19 BAC.

At trial one of the investigating officers testified that he did not believe defendant was telling the truth about drinking after he arrived home and he believed that defendant had operated the vehicle while intoxicated. Defendant now argues that trial court erred in admitting this improper opinion testimony and that this error warrants reversal. We disagree.

Defense counsel did not object to the introduction of this testimony. Therefore, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460

Mich 750, 763; 597 NW2d 130 (1999). In order to warrant reversal, a defendant must demonstrate that 1) error occurred, 2) the error was plain, and 3) the plain error affected the outcome of the lower court proceeding. *Id.* Even if each of these requirements is met, reversal will not be warranted unless the error resulted in the conviction of an actually innocent person or seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence. *Id.*

Whatever the merits of defendant's claim of error, defendant failed to demonstrate that the claimed error affected the outcome of the lower court proceeding. Therefore, reversal is not warranted.

Defendant also argues that trial counsel's failure to object to the officer's opinion testimony deprived him of the effective assistance of counsel. Defendant asserts that the testimony was clearly improper and prejudicial, and that defense counsel should have objected to it, moved to strike it, or sought a curative instruction. We disagree.

Because defendant did not move for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

To establish an ineffective assistance of counsel claim, defendant first must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). The defendant must overcome a strong presumption that counsel's actions constituted sound trial strategy. *Id.* Second, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.*

Defense counsel apparently sought the officer's opinion testimony as part of a strategy to show that the officer failed to conduct a more thorough investigation into whether defendant was telling the truth about drinking shortly after he arrived home. Hence, defendant has failed to show that defendant's trial counsel's actions were not sound trial strategy. Moreover, because we have determined that the allegedly improper testimony was harmless, defendant cannot demonstrate that, but for his trial counsel's performance, the outcome of the trial would have been different. Therefore, any error does not warrant a new trial.

Affirmed.

/s/ William C. Whitbeck
/s/ William B. Murphy
/s/ Michael R. Smolenski